

IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

SUSSEX COUNTY REPUBLICAN
COMMITTEE, THE REPUBLICAN
STATE COMMITTEE OF DELAWARE,
and BRIAN PETTYJOHN,

Plaintiffs,

v.

SUSSEX COUNTY DEPARTMENT
OF ELECTIONS, KENNETH L.
McDOWELL, ELAINE MANLOVE and
DELAWARE DEPARTMENT OF
ELECTIONS,

Defendants.

C.A. No. _____

VERIFIED COMPLAINT

Plaintiffs Sussex County Republican Committee, The Republican State Committee of Delaware, and Brian Pettyjohn, by and through their undersigned counsel, hereby state and aver as follows:

The Parties

1. The Sussex County Republican Committee is the local arm for Sussex County of The Republican State Committee of Delaware, a political party under Title 15 of the Delaware Code.

2. Brian Pettyjohn is a registered Republican, who desires to be the Republican candidate for Delaware State Senate for the 19th Senatorial District.

3. The Sussex County Department of Elections is a division of the Delaware State Department of Elections. Kenneth L. McDowell is the Director of the Sussex County Department of Elections.

4. The Delaware Department of Elections is a department of the State of Delaware. Elaine Manlove is the Commissioner of Elections for the State of Delaware.

Jurisdiction

5. This Court has jurisdiction pursuant to 10 *Del. C.* §341.

Facts

6. On or about September 11, 2012, a Republican primary election was held to determine the candidate for the Republican Party for the 19th State Senatorial District. Mr. Eric Bodenweiser defeated Mr. Joseph Booth and was declared the winner of the primary, thereby becoming, under Delaware State law, the Republican Party's candidate for State Senate for the 19th State Senatorial District.

7. Upon information and belief, sometime in September or early October, 2012, Mr. Bodenweiser became the target of an investigation by the Delaware State Police.

8. Beginning in September or early October, 2012, Mr. Bodenweiser's level of campaign activity diminished. Various newspaper accounts reported Mr. Bodenweiser's lack of campaign activity.

9. On or about Friday, October 12, 2012, in an email to the Delaware Republican Party, Mr. Bodenweiser announced that he was "suspending" his campaign for personal and family reasons.

10. Attempts to reach Mr. Bodenweiser following the October 12, 2012 email were unsuccessful. Mr. Bodenweiser would not return phone calls or emails. Attempts to reach him through visits to his house were unsuccessful.

11. Upon information and belief, on or about October 17, 2012, Mr. Bodenweiser appeared at the Sussex County Department of Elections offices and filed papers designed to

withdraw his name as a candidate in the general election. According to Commissioner Manlove, Bodenweiser's name has been removed from the ballot.

12. Title 15, Section 3306(a) ("Section 3306") provides:

§3306. Supplemental Certificates of Nomination.

Whenever it shall be determined, subsequent to the dates specified in §3303 of this Title, that a *duly nominated candidate will be unable to serve if elected because of death, physical, mental or other incapacity*, the State, county or city (if a municipality holds its election at the time of the general election) committee shall convene within twenty-four hours of said determination to authorize the filing of a supplemental certificate of nomination for a substitute candidate, or to decline to issue such a certificate. However, in the case of the death of a candidate, said committee may convene within a reasonable period of time sufficient to have the new candidate's name placed on the ballot, but in no case later than five days from the date of the death.

(emphasis provided).

13. On or about the evening of October 17, 2012, the Sussex County Republican Committee decided to place the name of Mr. Brian Pettyjohn on the ballot as the Republican candidate for State Senate for the 19th Senatorial District.

14. On or about October 18, 2012, the Sussex County Republican Committee submitted a Supplemental Certificate of Nomination to the Sussex County Department of Elections. A copy of this letter is attached as Exhibit A.

15. By return letter also dated October 18, 2012, Commissioner Manlove responded, expressing her belief that mere withdrawal from the race did not constitute "physical, mental or other incapacity." She asked for further information about the nature of the incapacity. A copy of this letter is attached as Exhibit B.

16. Following receipt of Ms. Manlove's letter, further attempts were made to contact Mr. Bodenweiser. They were unsuccessful.

17. On or about Monday, October 22, according to press reports, Mr. Bodenweiser was indicted on 113 felony counts. Upon further information and belief, later that day he voluntarily turned himself in, and spend the evening of October 22 in jail. On the afternoon of October 23, Mr. Bodenweiser was released on bond.

18. On October 23, counsel for the Republican Party spoke with an attorney for the Department of Elections explaining the unsuccessful attempts to reach Mr. Bodenweiser and his refusal to return phone calls or emails. The attorney for the Department of Elections nevertheless expressed his belief that something further should be provided to support the claim of "other incapacity." The parties discussed obtaining an affidavit from Mr. Bodenweiser, and the Department's attorney indicated that an affidavit would be acceptable.

19. Party officials continued to try and reach Mr. Bodenweiser throughout the remainder of the 23rd and the 24th, but were unable to do so.

20. On the afternoon of October 24, Commissioner Manlove issued a letter indicating that she would complete preparations for the upcoming election without a Republican candidate on the ballot. A copy of this letter is attached as Exhibit C. The letter makes no mention of the Republican Party's unsuccessful attempts to reach Mr. Bodenweiser, nor does it refer to the felony indictment and the obvious problems caused by such indictment.

21. Upon information and belief, the Department of Elections intends to put a white sticker over the name of Mr. Bodenweiser on voting machines; however, such sticker could just as easily have the name of Mr. Pettyjohn on them.

22. According to representations made by counsel to the Department of Elections, approximately 800 absentee ballots have been sent out in the 19th Senatorial District. No Republican candidate appears on those ballots. Time remains to send out corrective ballots.

23. It is obvious from press accounts and the public record, as well as Mr. Bodenweiser's filed withdrawal documents and his refusal to respond to phone calls and emails, that Mr. Bodenweiser has no time to do anything other than attend to the defense of the 113 felony counts set forth in the indictment and is not able to campaign for elective office. Even if one imagines that this incapacity is temporary, one must consider the possibility of conviction. If convicted, he will be ineligible to serve in the General Assembly. *Del. Const.*, Art. II §21. Accordingly, Mr. Bodenweiser suffers from an "other" incapacity set forth in Section 3306.

24. Delaware Courts have recognized the paramount importance of giving voters a choice:

[e]lection laws are not merely technical creatures creating or regulating private rights. They are of transcending public importance, touching upon – indeed giving vitality to – the most fundamental of our rights. Thus, . . . the right of the public to an open, effective . . . election is a right that enters importantly into [any] analysis.

Bartley v. Davis, Del.Ch., 1986 WL 8810, *9 (Del. Ch.). Chancellor Allen went on to observe that in interpreting the Election Code one must "try to give to the applicable legislative words the meaning and effect that best fosters and promotes the attainment of these purposes [i.e., the right to free and equal elections]."

Count I – Temporary Restraining Order, Permanent Injunction

25. Plaintiffs incorporate all of the foregoing paragraphs as if fully set forth herein.

26. The October 24 letter indicates that the Department of Elections intends to complete the ballot preparation process without including the name of Brian Pettyjohn.

27. The mailing of absentee ballots without Mr. Pettyjohn's name has and will deprive the voters, Mr. Pettyjohn and the Sussex County Republican Committee of their right to have Mr. Pettyjohn's name on the ballot.

28. Plaintiffs lack an adequate remedy at law.
29. Plaintiffs will be irreparably harmed in the absence of injunctive relief.

Count II -- Mandamus

30. Plaintiffs incorporate all of the foregoing paragraphs as if fully set forth herein.
31. Due to Mr. Bodenweiser's withdrawal of his name, his lack of campaign activity and lack of responsiveness to attempts by the Republican Party to reach him, he suffers from "other incapacity" within the meaning of Section 3306. Consequently, the Sussex County Republican Committee is entitled to place the name of a candidate on the ballot.

32. The Sussex County Department of Elections has a clear duty to accept the Supplemental Certificate of Nomination.

33. The Sussex County Republican Committee and Mr. Brian Pettyjohn are entitled to a writ of mandamus ordering the Sussex County Department of Elections to place Mr. Brian Pettyjohn's name on the general election ballot as the Republican candidate for the 19th Senatorial District.

Count III – Declaratory Judgment

34. Plaintiffs incorporate all of the foregoing paragraphs as if fully set forth herein.

35. Pursuant to 10 *Del.C.* §6501 *et.seq.*, plaintiffs request a declaration that they are entitled to place Mr. Brian Pettyjohn's name on the general election ballot as the Republican candidate for the 19th Senatorial District.

36. In the absence of such relief, Republican voters will not be able to vote for a designated Republican candidate on voting machines during the general election.

Count IV – Review By Writ of Certiorari

37. Plaintiffs incorporate all of the foregoing paragraphs as if fully set forth herein.

38. The October 24 letter decision of Commissioner Manlove is contrary to law and not supported by substantial evidence.

WHEREFORE, for all the reasons set forth herein, plaintiffs pray that this Court:

- a. issue a temporary restraining order, preliminary injunction, and permanent injunction enjoining defendants from mailing out absentee ballots or otherwise publishing ballots without the name of Brian Pettyjohn as the Republican candidate for State Senate in the 19th Senatorial District;
- b. declare that Brian Pettyjohn should be placed on the ballot as the Republican candidate for State Senate in the 19th Senatorial District;
- c. issue a writ of mandamus directing the defendants to place the name of Brian Pettyjohn on the ballot as the Republican candidate for State Senate in the 19th Senatorial District;
- e. award such other relief as the Court deems appropriate.

Respectfully submitted,

SAUL EWING LLP

/s/ William E. Manning

William E. Manning (#697)

Richard A. Forsten, Esquire (#2543)

222 Delaware Avenue, Suite 1200

Wilmington, DE 19801

(302) 421-6800

Date: October 25, 2012

Attorneys for Plaintiffs

IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

SUSSEX COUNTY REPUBLICAN)
COMMITTEE, THE REPUBLICAN)
STATE COMMITTEE OF DELAWARE,) C.A. No.
and BRIAN PETTYJOHN,)

Plaintiffs,)

v.)

SUSSEX COUNTY DEPARTMENT OF)
ELECTIONS, KENNETH L.)
McDOWELL, ELAINE MANLOVE, and)
DELAWARE DEPARTMENT OF)
ELECTIONS,)

Defendants.)

VERIFICATION OF PLAINTIFFS

STATE OF DELAWARE)
) SS.
COUNTY OF SUSSEX)

I, John Sigler, Chairman of the Republican State Committee of Delaware,,
Plaintiff in the attached Verified Complaint, being duly sworn, do hereby state as follows:


I have personally reviewed the attached Verified Complaint being filed in the Court of
Chancery of the State of Delaware and make this Verification on behalf of all Plaintiffs.

Insofar as the matters contained in the Verified Complaint concern the acts and deeds of
The Republican State Committee Of Delaware, the Sussex County Republican Committee and/or
Brian Pettyjohn, Plaintiffs in the attached Verified Complaint, I know the allegations to be true
and correct.

Insofar as the matters contained in the Verified Complaint concern the acts and deeds of
persons and entities other than The Republican State Committee Of Delaware, the Sussex
County Republican Committee and/or Brian Pettyjohn the allegations are true and correct to the
best of my knowledge, information and belief.


John C. Sigler
Chairman, Republican State Committee of Delaware

SWORN AND SUBSCRIBED before me this 25th day of October, 2012.


Nina Renee Pommell
Notary Public

My Commission expires on March 6, 2014

EXHIBIT A

Sussex County Republican Committee
Box 388
Georgetown, DE 19947

October 18, 2012

HAND DELIVERY

The Honorable Elaine Manlove
Commissioner of Elections
905 S. Governor's Ave., Suite 170
Dover, DE 19904

Re: Issue Advocacy and Delaware Campaign Finance Laws

Dear Commissioner Manlove:

With this letter, pursuant to Title 15, Section 3306, I enclose a Supplemental Certificate of Nomination for Mr. Brian Pettyjohn as the Republican candidate for State Senate for the 19th State Senate District. This is being filed in light of the unilateral "withdrawal" by Mr. Eric Bodenweiser as the Republican for that office, which your office has received and accepted. As you know, Section 3306 states that a party may nominate a replacement candidate due to "death, physical, mental or other incapacity" of the duly nominated candidate. It is our position that the unilateral withdrawal by Mr. Bodenweiser constitutes "other incapacity" and we therefore submit the enclosed Supplemental Certificate.

To the extent you have any doubt that Mr. Bodenweiser's decision to withdraw gives the party the right to name a replacement candidate, it is important to remember that election laws are to be liberally construed. Giving voters a choice, and the right to a fair and honest election is paramount. Neither the voters nor any political party should have to depend on a cumbersome write-in process where the ballot problem is not a creature of their making. The Court of Chancery has observed that:

Election laws are not merely technical creatures creating or regulating private rights. They are of transcending public importance, touching upon -- indeed giving vitality to -- the most fundamental of our rights. Thus, . . . the right of the public to an open, effective . . . election is a right that enters importantly into [any] analysis.

Bartley v. Davis, Del.Ch., C.A.No. 8561, Allen, C., (Aug. 14, 1986) slip op. at 27. Chancellor Allen went on to observe that in applying the Election Code one is to "try to give to the applicable legislative words the meaning and effect that best fosters and promotes the attainment of these purposes [i.e., the right to free and equal elections]."

With these broad principles in mind, then, the unilateral withdrawal of a candidate -- for whatever reason -- must be viewed as an "incapacity," whether physical, mental or "other."

October 18, 2012

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Indeed, the term "other" was obviously intended to catch all other situations not covered by the words "physical," or "mental." Otherwise, the inclusion of the word would make no sense.

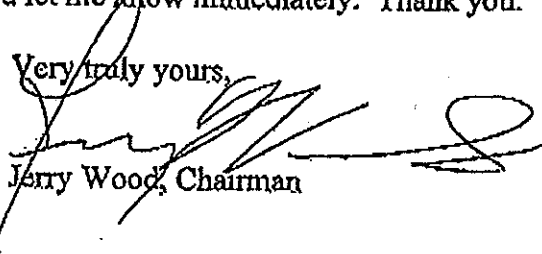
In keeping with these important principles of our democracy, and the rule that election laws are to be liberally construed, we ask that you put Mr. Pettyjohn on the ballot. You may recall that in New Jersey several years ago, the Democratic Party sought to replace its original candidate for United States Senate with a new candidate after the "deadline" for naming candidates had passed and the original candidate, Robert Torricelli, withdrew. Nothing in the statute allowed such replacement, but the New Jersey Supreme Court directed that the replacement candidate's name be placed on the ballot. In doing so, the Court observed:

It is in the public interest and the general intent of the election laws to preserve the two-party system and to submit to the electorate a ballot bearing the names of candidates of both major political parties as well as of all other qualifying parties and groups. . . . statutes providing requirements for a candidate's name to appear on the ballot will not be construed so as to deprive the voters of the opportunity to make a choice. . . . We do not believe that our Legislature intended to limit voters' choice in a case where there is sufficient time to place a new candidate on the ballot and conduct the election in an orderly manner.

New Jersey Democratic Party, Inc. v. Samson, 814 A.2d 1028, 1034-35, 1036, 1039 (N.J. 2002). These same ideas are just as applicable in Delaware.

Because the general election is now less than 3 weeks away, if you do not intend put Mr. Pettyjohn's name on the ballot, I ask that you let me know immediately. Thank you.

Very truly yours,


Jerry Wood, Chairman

Sussex County Republican Committee

Supplemental Certificate of Nomination

TO: Sussex County Board of Elections

FROM: Jerry Wood, Chairman

Pursuant to the provisions of Title 15, Section 3306 of the Delaware Code, we do hereby certify that the persons set forth below were nominated for the following positions:

Delaware State Senate:

19th District: Brian G. Pettyjohn

3 Cinder Way

Georgetown, DE 19947

IN WITNESS THEREOF, the undersigned, being the Presiding Officer and Secretary of the Sussex County Republican Committee, do hereby set forth their hands this 18th day of October, 2012.


Jerry Wood

36272 Nubbin Cove

Frankford, DE



Carol A. Bodine

24 Wedgefield Blvd.

Ocean View, DE

BE IT REMEMBERED THAT ON THIS 18th day of October, 2012 personally came before me, the Subscriber, a notary public for the State and County aforesaid, Jerry Wood and Carol A. Bodine, party to this instrument in Writing to be their deed.

GIVEN under my HAND and SEAL the day and year aforesaid.


Notary Public

DAWN M. CAREY
NOTARY PUBLIC
STATE OF DELAWARE
My Commission Expires on 1/13/2016


Name

My commission expires: 1/13/16

EXHIBIT B



STATE OF DELAWARE
office of the
STATE ELECTION COMMISSIONER

Elaine Manlove
Commissioner of Elections

October 18, 2012

PHONE (302) 739-4277
FAX (302) 739-6794

Mr. Jerry Wood, Chairman
Sussex County Republican Committee
Box 388
Georgetown, DE 19947

Dear Mr. Wood:

Thank you for your letter dated October 18, 2012 containing a Supplemental Certificate of Nomination for Mr. Brian Pettyjohn as the Republican candidate for State Senate for the 19th senatorial district. As I read your letter, you believe that the withdrawal by Eric Bodenweiser is itself incapacity. I do not agree with your interpretation of 15 *Del. C.* § 3306. Section 3306 reads, in pertinent part, as follows:

Whenever it shall be determined, subsequent to the dates specified in § 3303 of this title, that a duly nominated candidate will be unable to serve if elected because of death, physical, mental or other incapacity, the state, county or city (if a municipality holds its election at the time of the general election) committee shall convene within 24 hours of said determination to authorize the filing of a supplemental certificate of nomination for a substitute candidate...

15 *Del. C.* § 3306(a)

The proper inquiry is the nature of the Mr. Bodenweiser's incapacity that would make him unable to serve, if elected. Therefore, please identify the mental, physical or other incapacity that would make Mr. Bodenweiser's unable to serve if elected. I cannot accept a supplemental Certificate of Nomination prior to receiving the information necessary to support a finding of incapacity.

Thank you.

Very truly yours,

Elaine Manlove
State Election Commissioner

EXHIBIT C



STATE OF DELAWARE
office of the
STATE ELECTION COMMISSIONER

Elaine Manlove
Commissioner of Elections

PHONE (302) 739-4277
FAX (302) 739-6794

October 24, 2012

(Via E-Mail)

Mr. Jerry Wood, Chairman
Sussex County Republican Committee
Box 388
Georgetown, DE 19948

Dear Mr. Wood:

On October 18, 2012, I asked that the Sussex County Republican Committee identify the mental, physical or other incapacity that would make Mr. Bodenweiser unable to serve if elected and information to support a finding of such incapacity. To date, I have received no such identification or supporting information. Therefore, today, I am confirming my October 18 determination that there is no incapacity and completing preparations to conduct an election for the 19th Senate District seat without a Republican candidate.

Very truly yours,

A handwritten signature in cursive script that reads "Elaine Manlove".

Elaine Manlove
State Election Commissioner

Cc: Richard Forsten, Esq.
Elizabeth D. Maron, Esq.
A. Ann Woolfolk, Deputy Attorney General
Kenneth McDowell, Director, Dept. of Elections for Sussex County
Jean Turner, Deputy Director, Dept. of Elections for Sussex County